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COLLATERAL ATTACK BY HABEAS CORPUS UPON FEDERAL JUDGMENTS IN CRIMINAL CASES

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MANY LAWYERS NEVER in their careers have occasion to employ the writ of habeas corpus. It is only natural that there should exist, even within the profession, widespread lack of knowledge about the substantive rights guarded by this great engine of release and the procedures involved in its use. This article is designed to demonstrate the scope and manner of using the writ to attack criminal judgments of sentence in federal cases.

The writ is an order of a court of law to an individual, the respondent, requiring him to produce at a certain time and place the body of a named person who is purportedly in the custody of the respondent. Various forms of the writ were available at common law,¹ but *habeas corpus ad subjiciendum* is the only form presently of importance.

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¹ Blackstone lists the following: *ad respondendum* (to remove a prisoner confined under process of an inferior court and charge him with a new action in the court above), *ad satisfaciendum* (to bring a prisoner up to some superior court to charge him with process of execution on a judgment there obtained), those *ad prosequendum*, *testificandum*, *deliberandum*, etc. (to remove a prisoner in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction), including the common writ *ad faciendum et recipiendum* (to remove a cause from some inferior jurisdiction into the superior court), "but the great and efficacious writ, in all manner of illegal confinement is that of *habeas corpus ad subjiciendum* a high, prerogative writ." 3 Inst. 129-131. In 28 U. S. C. A. 377, the federal courts are given a general power to issue writs not specifically provided for by statute.

Originally known as the "great writ," it has usurped the position of all the others and is now commonly referred to as "the writ of habeas corpus." Its purpose was to inquire into the legality of the confinement of the petitioner, but in early times that had a meaning quite different from the meaning given to "legality" in present-day investigations pursuant to the writ.²

Some writers trace the origin of the writ to the Romans,³ and others believe that it is unique to Anglo-Saxon law.⁴ Known to the common law even before the Magna Charta and enshrined in statute in 1679 by the famous Habeas Corpus Act, it crossed the Atlantic with the British colonists and in America it has, since the beginning, been regarded as one of the most precious rights of free men. This regard was expressed when the Constitution was drafted with the inclusion of the provision that: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." This was not a grant of power to the federal courts but only a limitation on the powers of Congress,⁵ but in the Judiciary Act of 1789⁶ Congress gave to the courts of the United States the power to inquire by habeas corpus into the legality of the confinement of those imprisoned under the authority of the federal government. The scope of the power has been successively extended by statutory provisions culminating in the Act of 1867,⁷ and the law

² Originally the writ seems to have been a device to put people into prison, but somewhere it underwent a metamorphosis and came to be used against the king. Jenks, *The Story of Habeas Corpus*, 18 L. QUART. REV. 64 (1902).

³ W. W. Howe, *STUDIES IN CIVIL LAW* 54 (1905).

⁴ 2 Pollock and Maitland, *HISTORY OF ENGLISH LAW* 584 (1905).

⁵ *In re Barry*, 42 Fed. 113, 122 (1844). However, it was asserted in *Prigg v. Commonwealth of Pennsylvania*, 41 U. S. 539 (1842) that Congress has the power to provide for habeas corpus and to give the courts power to issue the writ.

⁶ "That all the before mentioned courts shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not especially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, and that either of the Justices of the Supreme Court, as well as the Judges of the District Courts shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of the commitment: Provided, that writs of habeas corpus shall in no case extend to prisoners in jail unless they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 STAT. 81.

⁷ This Act conferred upon the several courts of the United States and their justices and judges "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty, in violation of the Constitution, or of any treaty, or law of the United States." 14 STAT. 385. Such power was in addition to other amendments to the Judiciary Act of 1789, adding power to inquire into state confinement (1833) and confinement of aliens under "the law of nations" (1842). 4 STAT. 634, 5 STAT. 539. These statutes were subsequently amended in minor details, but the provisions remain substantially the same. See 28 U. S. C. A. 377, 451 *et seq.*, Walker v. Johnson, 312 U. S. 275, 285 (1941), *Ex parte Yerger*, 75 U. S. 85 (1869).

governing its exercise has been continuously broadened since that time by decisions of the Supreme Court,⁸ until it has been said that it "is available, not only to determine points of jurisdiction, *stricti juris*, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice."⁹

SUBSTANTIVE RIGHTS

Although the writ has a variety of uses in connection with detention prior to judgment, or involving state action or action by administrative officers,¹⁰ its employment to attack a judgment in a criminal case was considered in an early opinion,¹¹ written by Chief Justice Marshall for the Supreme Court. Holding that English jurisprudence is "to a

⁸ For a discussion of the background of these changes, see *Frank v. Mangum*, 237 U. S. 309 (1915), *In re Neagle*, 135 U. S. 1 (1890), *McNally v. Hill*, 293 U. S. 131 (1934), *Ex parte Craig*, 282 Fed. 138 (C. C. A. 2d 1922), *Ex parte Rosier*, 133 F.(2d) 316 (App. D. C. 1942).

⁹ Judge Learned Hand, in *U. S. ex rel. Kulick v. Kennedy*, 157 F.(2d) 811 (C. C. A. 2d 1946).

¹⁰ Setting aside the action of a state court is a serious interference with the sovereignty of the state, and special rules developed by the Supreme Court limit such power in the federal courts. See *Urquhart v. Brown*, 205 U. S. 179 (1906), *Ex parte Hawk*, 321 U. S. 114 (1944), *Mooney v. Holohan*, 294 U. S. 103 (1935), *Williams v. Kaiser*, 323 U. S. 471 (1945), *White v. Ragen*, 324 U. S. 760 (1945), *House v. Mayo*, 324 U. S. 42 (1945), *Rice v. Olsen*, 324 U. S. 786 (1945). Three of the main branches of review by habeas corpus of administrative action are those connected with deportation, e.g., *Bridges v. Wixon*, 326 U. S. 135 (1945), *Asakura v. Seattle*, 265 U. S. 342 (1924), *Kumanomido v. Nagle*, 40 F.(2d) 42 (C. C. A. 9th 1930), *Selective Service, e.g., Estep v. U. S.*, 327 U. S. 114 (1946), *Ex parte Endo*, 323 U. S. 283 (1944), *Bagley v. Vice*, 151 F.(2d) 700 (C. C. A. 9th 1945), *Sullivan v. Swartzka*, 148 F.(2d) 965 (C. C. A. 9th 1945), and mental hospitals, e.g., *Overholser v. Treibly*, 147 F.(2d) 705 (App. D. C. 1945), *Howard v. Overholser*, 130 F.(2d) 429 (App. D. C. 1942). Another type of administrative action, which is likewise outside the scope of this article, is action applicable to parole matters and "good conduct" allowances under a valid judgment, or pursuant to a properly granted pardon. Statutory credits for good behavior are mandatory, and the same may be said for the effect of a pardon. *Carroll v. Squier*, 136 F.(2d) 571 (C. C. A. 9th 1943), *cert. denied*, 320 U. S. 793 (1943), *Tippit v. Squier*, 145 F.(2d) 211 (C. C. A. 9th 1944), *Cox v. McConnell*, 80 F.(2d) 258 (C. C. A. 5th 1935), *Clark v. Surprenant*, 94 F.(2d) 969 (C. C. A. 9th 1938), *Platek v. Aderhold*, 73 F.(2d) 173 (C. C. A. 5th 1934), *Pagliari v. Cox*, 143 F.(2d) 900 (C. C. A. 8th 1944), *Carroll v. Zerbst*, 76 F.(2d) 961 (C. C. A. 10th 1935), and the annotation at 148 A. L. R. 1243. As to parole matters, see *Kirk v. Squier*, 150 F.(2d) 3 (C. C. A. 9th 1945) and the cases there cited. On pardons, see *Lupo v. Zerbst*, 92 F.(2d) 362 (C. C. A. 5th 1937), *cert. denied*, 303 U. S. 46 (1938), *Stroud v. Johnston*, 139 F.(2d) 171 (C. C. A. 9th 1943), *Morgan v. Aderhold*, 73 F.(2d) 171 (C. C. A. 5th 1934), and the *Platek* case, *supra*. This use of habeas corpus to review prison administration might very well be extended to a yet unexplored field. If, for example, a prisoner were strung up by his thumbs, or kept in solitary confinement under a sentence to confinement in the customary manner, could the court inquire into the "legality" of the confinement? See *Stroud v. Johnston*, *supra*, and compare the Constitutional prohibition of cruel and unusual punishments. U. S. CONST. AMEND. VIII. *Coffin v. Reichard*, 143 F.(2d) 443, 155 A. L. R. 143 (C. C. A. 6th 1944) supports this view. See the annotation in A. L. R. But *Snow v. Roche*, 143 F.(2d) 718 (C. C. A. 9th 1944), *cert. denied*, 323 U. S. 788 (1944), holds that the discipline of the prison is not reviewable by habeas corpus.

¹¹ *Ex parte Watkins*, 3 Pet. (U. S.) 193 (1830). See also 26 U. S. C. A. 453.

considerable degree incorporated into our own," he announced the following rule: "This writ is in the nature of a writ of error which brings up the body of the prisoner with the cause of commitment.

An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." It is clear that the contrast between erroneous and void is phrased in terms of jurisdiction or no jurisdiction. Jurisdiction, then, is the turning point of inquiry by habeas corpus into illegal detention under a judgment. Whether a court is *de facto* or *de jure* is not a jurisdictional question in this sense.¹²

One of the primary requisites of jurisdiction lies in the relationship of the parties to the court. If the court rendering the judgment has no jurisdiction over the parties, then its judgment is void and may be set aside at any time. The first step then is to determine whether the sentencing court had jurisdiction over the person, the place, and the act concerned. If we assume that the person is not the representative of a foreign government,¹³ the question of geographical jurisdiction arises. Did the court which rendered the judgment have jurisdiction over the place where the criminal act was committed? It is clear that the courts of the United States, state or federal, ordinarily have no jurisdiction over crimes committed in China.¹⁴ By the same token, whether the federal court had jurisdiction in many cases depends upon whether the crime was committed within an area where the jurisdiction of the United States is exclusive (an Indian reservation,¹⁵ a national park,¹⁶ or an army post,¹⁷ etc.) or at a place within the jurisdiction of a state.

Conceding that the petitioner may not ordinarily retry the question of fact as to where the crime was committed,¹⁸ another court may still

¹² *McDowell v. U. S.*, 159 U. S. 596 (1895), *In re Ah Lee*, 5 Fed. 899 (D. C. D. Ore. 1880) *Ex parte Ward*, 173 U. S. 452 (1899).

¹³ See the interesting historical discussion in *Underhill v. Hernandez*, 65 Fed. 577, 38 L. R. A. 405 (C. C. A. 2d 1895), *Horn v. Mitchell*, 232 Fed. 819 (C. C. A. 1st 1916), dismissed on appeal, 243 U. S. 247 (1917).

¹⁴ Excepting conspiracies intended to affect activities or things within the United States.

¹⁵ *Hatten v. Hudspeth*, 99 F.(2d) 501 (C. C. A. 10th 1938), *Davis v. Johnston*, 144 F.(2d) 862 (C. C. A. 9th 1944).

¹⁶ *Bowen v. Johnston*, 306 U. S. 19 (1939).

¹⁷ *Rogers v. Squier*, 157 F.(2d) 948 (C. C. A. 9th 1946).

¹⁸ In the extraordinary case where injustice is clearly apparent, it is by no means certain that the petitioner would not be permitted to retry the issue of fact as to where the crime occurred. *Bowen v. Johnston*, *supra* note 16, *Kulick v. Kennedy*, *supra* note 9.

apply the remedy afforded by the writ of habeas corpus when the need for it is apparent and where only a question of law is involved.¹⁹ If the geographical limits of a reservation turn upon the construction of a statute, or if the court is called upon to determine whether the state has retained criminal jurisdiction over land ceded to the federal government,²⁰ the remedy of the writ is available to try those issues.

If the indictment or information does not charge a crime against the United States, the trial court is without jurisdiction and its judgment is void.²¹

An interesting attempt to apply this principle was recently made in the case of *Hart v. Squier*.²² The defendant, a narcotic addict, had gone to a doctor, given an assumed name, and procured a prescription for drugs. A druggist filled the prescription and the defendant was indicted for uttering a false, forged writing with the intent of defrauding the United States.²³ He pleaded guilty, was sentenced, and, after serving a portion of his term, petitioned for a writ of habeas corpus on the ground that the indictment did not charge a crime within the statute, since the prescription was genuine and was therefore not a forged writing. The court rejected his contention but only with some difficulty. Similar reasoning, at another time and in another case, where the facts alleged do not clearly come within any statute, or where a penal statute is unconstitutional,²⁴ may well be successful.

The constitutional guaranty against double jeopardy may well be considered at this point.²⁵ Some courts have held that a failure to

¹⁹ *Walsh v. Archer*, 73 F.(2d) 197 (C. C. A. 9th 1934), *Walsh v. Johnston*, 115 F.(2d) 806 (C. C. A. 9th 1940), *Bowen v. Johnston*, *supra* note 16; *Davis v. Johnston*, *supra* note 15.

²⁰ *Rogers v. Squier*, *supra* note 17.

²¹ For an excellent discussion see *Van Gardener v. Johnston*, 87 F.(2d) 654 (C. C. A. 9th 1937), *McNealy v. Johnston*, 100 F.(2d) 280 (C. C. A. 9th 1938). In holding some indictments proof against attack via habeas corpus, courts have intimated that appeal was the proper remedy. This rule is historical in origin and under modern rules of practice the distinction is losing any practical effect. Cf. *Moore v. Aderhold*, 108 F.(2d) 729 (C. C. A. 2d 1939). If an indictment or information be so vague and uncertain that the defendant cannot tell of what he is accused, he may rely on his right "to be informed of the nature and cause of the accusation." U. S. CONST. AMEND. VI See *White v. Levine*, 40 F.(2d) 502 (C. C. A. 10th 1930), *Brown v. White*, 24 F.(2d) 392 (C. C. A. 8th 1928).

²² 159 F.(2d) 639 (C. C. A. 9th 1947).

²³ 18 U. S. C. A. 72.

²⁴ *Audett v. Johnston*, 142 F.(2d) 739 (C. C. A. 9th 1944), *cert. denied*, 323 U. S. 743 (1944), *Novothy v. Ragen*, 88 F.(2d) 72, 74 (C. C. A. 7th 1937), *Ex parte Hatem*, 38 F.(2d) 226 (C. C. A. 6th 1930).

²⁵ Though similar, the statute of limitations is probably not grounds for the writ. See *Wallace v. Hunter*, 149 F.(2d) 59 (C. C. A. 10th 1945), *U. S. ex rel. Hassell v. Mathues*, 27 F.(2d) 137 (E. D. Penn. 1928), *Strewl v. Sanford*, 151 F.(2d) 648 (C. C. A. 5th 1945). Nor will an objection that the statute under which the petitioner

assert the defense at the trial waives the right altogether,²⁶ and it would follow, therefore, that it could not be asserted through habeas corpus.²⁷ But this interpretation seems incorrect in principle, for if the indictment charges the same offense as has been previously pressed against the accused, then the court is acting contrary to the constitution from the very beginning—*i.e.*, the court is without jurisdiction from the very beginning. Moreover, there are no practical considerations which would require a contrary rule, for this is something that appears of record and is purely a matter of law. Therefore, the better if not universally accepted view is that upon a showing of double jeopardy the lack of jurisdiction of the trial court in the beginning is established and the writ is the proper remedy to set aside the judgment.²⁸ Of course if the issue had been raised and decided by the trial court, its decision, if not conclusive upon the later application for habeas corpus, would be given great weight.²⁹

A related problem is inherent in the recent decision in *Ballard v. United States*.³⁰ The Supreme Court there reversed the lower court and ordered an indictment dismissed on the ground that the indictment was void because women had been systematically excluded from the panel from which the grand jury was chosen. A similar decision had been rendered before as to the petit jury from which wage earners had been excluded.³¹ Do these decisions mean that all indictments by such grand juries are *void*? On the basis of recorded decision, no, because the courts have held that habeas corpus would not lie where Negroes were improperly excluded from the jury panel, on the ground that by failing to object at the trial and upon appeal, the petitioner had waived any right he might have.³² However, the language used in the *Ballard* case would seem to indicate a contrary viewpoint. More-

was convicted had been repealed prior to his trial serve to defeat the judgment, although this result seems incorrect on principle. *Petra v. Archer*, 8 F.(2d) 354 (C. C. A. 9th 1925).

²⁶ *U. S. v. Mulligan*, 67 F.(2d) 321 (C. C. A. 2d 1933), *Brady v. U. S.*, 24 F.(2d) 399 (C. C. A. 8th 1928), *Levin v. U. S.*, 5 F.(2d) 598 (C. C. A. 9th 1925).

²⁷ *Bracey v. Zerbst*, 93 F.(2d) 8 (C. C. A. 10th 1937), *Graham v. Squier*, 53 F. Supp. 881 (W. D. Wash. 1944), *affirmed* (on another ground), 145 F.(2d) 348 (C. C. A. 9th 1944), *cert. denied*, 324 U. S. 845 (1945).

²⁸ *Clawans v. Rives*, 104 F.(2d) 240 (App. D. C. 1939), *Bens v. U. S.*, 266 Fed. 152 (C. C. A. 2d 1920), *cert. denied*, 254 U. S. 634 (1920).

²⁹ See note 21, *supra*, and *Salinger v. Loisel*, 265 U. S. 224 (1924).

³⁰ 329 U. S. 187 (1946).

³¹ *Thiel v. So. Pac. R. R.*, 328 U. S. 217 (1946).

³² *Carruthers v. Reed*, 102 F.(2d) 933 (C. C. A. 8th 1939), *cert. denied*, 307 U. S. 643 (1939), *Cf. Hale v. Crawford*, 65 F.(2d) 739 (C. C. A. 1st 1933), *cert. denied*, 290 U. S. 674 (1933).

over, in *Bell v. U.S.*,⁸³ one defendant did not attack the jury panel, but upon appeal the indictment was dismissed even as to him upon the authority of the *Ballard* case, thus indicating that the Ninth Circuit Court of Appeals felt that he had not waived the issue by failing to assert it in the district court. If the defendant did not waive his right by failing to assert it at his trial, then it would always be available to him, even by a later application for a writ of habeas corpus.

So far no petitions, based upon these grounds, have been presented to the federal courts, but in view of the fact that there are a number of convicts who were indicted by such juries, either in Washington or in California, the Supreme Court will probably have to answer that question eventually.⁸⁴

Other cases, closely related in form, but vastly different in principle, require the same close scrutiny of the indictment. Where an indictment contains more than one count, of which only some are valid, and the defendant is convicted and sentenced upon all counts, the sentencing court has jurisdiction, but has, at most, only used its power excessively.⁸⁵ This situation is entirely different from that discussed above, for the power to issue the writ here springs from the concept that the confinement is contrary to law rather than that the trial court was without jurisdiction. This has led many courts to remark "that inquiry by habeas corpus is limited to the present legality of the confinement."⁸⁶ From this distinction it follows that the writ will not issue

⁸³ 159 F.(2d) 247 (C. C. A. 9th 1947).

⁸⁴ "No person shall be held to answer for a capital, or otherwise infamous crime unless on presentment or indictment of a grand jury. " U. S. CONST. AMEND. VI. An infamous crime is one punishable by imprisonment of more than one year. It follows, therefore, that if the prisoner were convicted upon an information rather than an indictment, his freedom might possibly be obtained by habeas corpus unless his petition is barred by waiver at the trial. When the court amends the indictment, without the grand jury, the judgment is void and habeas corpus will lie. *Ex parte Bain*, 121 U. S. 1 (1887).

⁸⁵ *Pyle v. Johnston*, 137 F.(2d) 869 (C. C. A. 9th 1943). See the interesting case where the trial court imposed sentences which were less than the legal minimum upon each of the last two counts and the prisoner was released after serving the valid sentence under the first count. *Copeland v. Archer*, 50 F.(2d) 836 (C. C. A. 9th 1931). Cf. *Cottrell v. Sanford*, 123 F.(2d) 75 (C. C. A. 5th 1941), *cert. denied*, 316 U. S. 684 (1942).

⁸⁶ *McDonald v. Johnston*, 149 F.(2d) 768 (C. C. A. 9th 1945), *McNally v. Hill*, 293 U. S. 131 (1934), *De Maurez v. Squier*, 121 F.(2d) 960, 962 (C. C. A. 9th 1941). Cf. *Wong v. Esola*, 6 F.(2d) 828 (C. C. A. 9th 1925) where there were admitted illegalities in the arrest and commitment, but on the hearing the government showed sufficient grounds for detention. Note also that when a recaptured prisoner is convicted of the crime of escaping, habeas corpus will not secure his release on the ground that he was originally detained under a void sentence. *Bayless v. U. S.*, 141 F.(2d) 578 (C. C. A. 9th 1944), *reversed* (on other grounds), 150 F.(2d) 236 (C. C. A. 9th 1945).

if the sentence given be a general one, and the total of the authorized sentences upon the valid counts is equal to or exceeds the actual sentence,³⁷ or if petitioner was sentenced upon each count and the sentences upon the valid counts have not yet been served. In any event. the excessive sentence is void only as to the excess, and the writ will never issue until so much of the sentence as was properly imposed is served.³⁸

As to the matters discussed above, the rules are fairly clear and the decisions in substantial accord. However, the third theoretical basis (where the trial court has proceeded to judgment in violation of the accused's fundamental constitutional rights) for issuing the writ is not so well understood. The task of setting the bench marks in this devious and uncertain field has kept the Supreme Court busy for the past few years and will occupy its time for many years more.³⁹ The Constitution set down in the first ten amendments certain limitations upon the powers of the federal government—guarantees of certain individual rights—and those limitations are binding upon the federal courts. It follows that when a federal court, having jurisdiction in the beginning, proceeds to judgment in a manner which violates one or more of the constitutional rights of the accused, the court loses jurisdiction and its judgment is void—*i.e.*, subject to collateral attack by habeas corpus.

This interesting and original doctrine had its birth in the case of *Johnston v. Zerbst*.⁴⁰ In that case, two men were indicted for passing counterfeit money and they were arraigned, tried, convicted, and sentenced in a single day. While confined in a federal penitentiary pursuant to that sentence, they sought a writ of habeas corpus and at the hearing upon the writ it developed that they had been without funds, of little education, and far from their friends and relatives at the time of the trial. They had made no request to the trial judge for counsel and none had represented them. It appeared that the trial court had jurisdiction originally and the district court denied the writ on the ground that "depriving petitioner of his constitutional right to the assistance of counsel was not sufficient to make the judgment void and justify its annulment in a habeas corpus proceeding, but was only a trial error to be corrected upon appeal." The circuit court of appeals

³⁷ *Ex parte De Bara*, 179 U. S. 316 (1900), *Barkdoll v. U. S.*, 147 F.(2d) 617 (C. C. A. 9th 1945).

³⁸ *Supra*, notes 36 and 37. Compare the situations indicated in note 10.

³⁹ The Supreme Court has written over thirty opinions on this subject in the past ten years.

⁴⁰ 304 U. S. 458 (1938).

affirmed, but the Supreme Court reversed, holding that the writ of habeas corpus had been so liberalized by the Act of Congress⁴¹ 'as to provide:

a judicial inquiry in a court of the United States into the very truth and substance of the causes of his [petitioner's] detention, although it may be necessary to look behind and beyond the record of his conviction [and that] Since the Sixth Amendment constitutionally entitles one charged with a crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to a conviction and sentence. If the accused however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.⁴²

This decision opened a Pandora's box from which an ever-increasing flood of cases flows, for it is but a step from this language to the proposition that the violation of any constitutional right during the course of a trial would render the judgment void. As we shall see, the rule does not extend that far, but in attempting to limit its application the courts have reached conflicting and confusing conclusions.

In sending the case back for findings of fact upon the issue of waiver, the Supreme Court recognized that the rights guaranteed by the first ten amendments to the Constitution were personal rights given to the individual which he could relinquish if he chose and then proceeded to define that relinquishment in the following terms:

It has been pointed out that the "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." *A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.* The determination of whether there has been an intelli-

⁴¹ Act of 1867, *supra* note 7

⁴² *Supra*, note 40, at pp. 466-468.

gent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.⁴³ (Author's italics)

But the court went further and pointed out that "When collaterally attacked, the judgment of a court carries with it a presumption of regularity." It follows, therefore, that the petitioner is presumed to have waived any infraction of his constitutional rights during his trial where he has either pleaded guilty or failed to object upon appeal,⁴⁴ unless the petitioner can show some disability, either physical or mental, which prevented him from making an intelligent, intentional relinquishment of his rights.

Although the fact of waiver should appear affirmatively in the record where possible, it is not absolutely essential that it so appear,⁴⁵ nor does the fact that it does so appear in the record necessarily preclude the petitioner from later denying any waiver. Rather the fact of an intelligent and understanding waiver must be apparent from *all* the facts and circumstances of the trial.⁴⁶ Even these matters are not entirely free from doubt and occasional thoughts expressed in dissenting or concurring opinions seem to indicate that the proper rule is not so certain as one would like it to be.⁴⁷ With that observation let us pass on to an examination of the fundamental constitutional rights already referred to, and there we can consider at greater length, if necessary, any additional problems of waiver that may be specifically related to a particular right.

Since the other amendments do not concern this phase of habeas corpus, we are here concerned with only three:⁴⁸ Amendments Four,

⁴³ *Ibid.*, p. 464.

⁴⁴ *Rice v. Olson*, 324 U. S. 786 (1945), *Williams v. Kaiser*, 323 U. S. 471 (1945), *Dainard v. Johnston*, 149 F.(2d) 749 (C. C. A. 9th 1945), *Michener v. Johnston*, 141 F.(2d) 171 (C. C. A. 9th 1944), 146 F.(2d) 129 (C. C. A. 9th 1944), *O'Keith v. Johnston*, 129 F.(2d) 889 (C. C. A. 9th 1942), *cert. denied*, 317 U. S. 680 (1942), *Walker v. Chitty*, 112 F(2d) 79 (C. C. A. 9th 1940).

⁴⁵ *Widmer v. Johnston*, 136 F.(2d) 416 (C. C. A. 9th 1943), *cert. denied*, 320 U. S. 780 (1943).

⁴⁶ *House v. Mayo*, *supra*, note 10; *Tomkins v. Missouri*, 323 U. S. 485 (1944), *Walker v. Johnston*, *supra*, note 7, cases cited *supra*, note 44.

⁴⁷ *E.g.*, Mr. Justice Murphy, dissenting in *Carter v. Illinois*, 329 U. S. 173 (1946).

⁴⁸ See the reference to the Eighth Amendment in note 10, *supra*. The other Amendments are not concerned with matters affecting the use of the writ.

Five, and Six. Amendment Four provides protection from unreasonable searches and seizures and limits the use of search warrants. Amendment Five provides for indictment by Grand Jury,⁴⁹ and security from double jeopardy, self-incrimination and convictions without due process of law. Amendment Six guarantees to the accused a speedy public trial by jury, the right to be informed of the nature and cause of the accusation, the right to be confronted by the witnesses against him, the right to have compulsory process to secure the attendance of witnesses for the defense, and the right to have counsel to assist in the defense. This is a total of twelve separate "rights," a violation of any one of which in the course of a trial may very well be sufficient to destroy the jurisdiction of the trial court and render void the judgment of conviction. For simplicity let us deal with these rights generally save where individual treatment will serve to clarify matters, placing emphasis upon what sort of violations will be sufficient grounds for a subsequent application for a writ of habeas corpus.

The most significant of the rights referred to above is that contained in the Fifth Amendment providing that no person shall "be deprived of life, liberty or property without due process of law." This same phrase is contained in the Fourteenth Amendment and its meaning, a long-time subject of controversy, has recently received an illuminating discussion with extended citation of authorities.⁵⁰ It has many times been confused with the total sum of the rights guaranteed by the Bill of Rights, that is, as a sort of shorthand reference to the items specifically enumerated above. But it is less than that and more. It has its own independent function and is not part and parcel of the other rights guaranteed, but rather serves to prohibit "the incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right."⁵¹ Thus where the threat of mob violence dominates a trial,⁵² or where the prosecution knowingly employs perjured testimony to obtain a conviction,⁵³ or where the judge or jury can be shown to have been prejudiced that a "fair" trial was impossible, so that although the proceedings were fair upon their face, the whole pro-

⁴⁹ See note 34, *supra*.

⁵⁰ Justice Frankfurter, concurring in *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1946).

⁵¹ *Betts v. Brady*, 316 U. S. 455, 473 (1941).

⁵² *Moore v. Dempsey*, 261 U. S. 86 (1922), *Downer v. Dunaway*, 53 F.(2d) 586 (C. C. A. 5th 1931).

⁵³ *White v. Ragen*, *supra*, note 10; *Pyle v. Kansas*, 317 U. S. 213 (1942), *Mooney v. Holohan*, *supra*, note 10; *Hall v. Johnston*, 91 F.(2d) 363 (C. C. A. 9th 1937).

ceedings were a sham and a farce of justice,⁵⁴ then the requirement of due process stands as a jurisdictional bar to the whole proceeding.

Where another of the guaranteed rights is invaded, however, it is not necessarily grounds for the writ. In many cases the courts have required that the infraction be so serious that the violation could be said to have deprived the petitioner of due process of law. Obviously one who is denied representation by counsel, or who is denied a speedy public trial by jury, is being denied that due process of law guaranteed by the constitution, for in federal courts such rights are requisite to due process.⁵⁵ However, some minor infraction of one of these constitutionally guaranteed rights will not violate our concept of due process, and failing that many courts generally hold that the writ will not lie. Their reasoning in reaching this result is not always entirely clear and may be based upon implied waiver, a lack of prejudice, or the idea that the error can only be reached upon appeal, but the true tenor of these opinions was accurately stated by Judge Miller speaking for the Circuit Court of Appeals for the District of Columbia when he said.

It has been suggested that the Supreme Court in the *Bowen* case and in other recent cases, intended to say that the writ of habeas corpus is available, not only when jurisdiction is lost during the course of the proceeding by deprivation of a constitutional right, but also whenever a petitioner is able to allege that he failed to enjoy a constitutional right. We see no reason to impute such an intention to the Supreme Court. A careful reading of its opinions will show that it is not the purpose of the writ to *compel* or *require* enjoyment of constitutional rights in all cases where, for example, they have been waived, intelligently, by the petitioner himself, or for him by counsel. The applicable rule has been well stated by Judge Parker: "Ordinarily, failure to raise a constitutional question during trial amounts to a waiver thereof [*United States v. Brady*, 4 Cir. 133 F(2d) 476, 481] and only where failure to raise the question at the trial was due to ignorance, duress or other reason for which petitioner should not be held responsible may resort be had to habeas corpus in the federal courts, and even in these cases, only where it is made to appear that there has been such gross violation of constitutional right as to deny to the prisoner the substance of a fair trial and thus oust the court of jurisdiction to impose sentence."⁵⁶

⁵⁴ Payment of extra fees to "expert" witnesses for the government does not violate due process. *Walker v. Squier*, 139 F.(2d) 28 (C. C. A. 9th 1943), *cert. denied*, 321 U. S. 792 (1943). But financial interest of the court in a share of the fines does. *Tumey v. Ohio*, 273 U. S. 510 (1926).

⁵⁵ The due process clause is most generally employed in collateral attacks by habeas corpus on judgments of state courts. Where federal judgments are concerned it is generally used jointly with the violation of some specific right guaranteed in the first ten Amendments.

⁵⁶ *Dorsey v. Gill*, 148 F.(2d) 857, 872 (App., D. C. 1945).

With due respect to Judge Miller, the above generalization is not entirely accurate. The breach of certain of these rights is so serious that there is no necessity to show prejudice, and on occasion convictions which seem to be eminently fair and just will be set aside. Moreover, the language of the Supreme Court cases would seem to indicate that violation of any specifically guaranteed right would be, without more, sufficient reason to set aside a judgment of conviction. For this reason the provisions of the Fourth and Fifth Amendments, and those of the Sixth Amendment must be considered separately, with special attention to the right to counsel as guaranteed by the Sixth Amendment.

The Fifth Amendment prohibits compelling any person in any criminal case to be a witness against himself. Not every infraction is so fundamental as to strike at the jurisdiction of the trial court, and the admission of his selective service questionnaire in evidence against the accused⁵⁷ or his being compelled to walk before the jury so they could observe him does not go to the jurisdiction of the court.⁵⁸ But where a confession of guilt is procured by third-degree methods such as beatings,⁵⁹ threats,⁶⁰ or prolonged questioning,⁶¹ no valid conviction can be based upon it.

The leading case on this matter is *Waley v. Johnston*,⁶² decided by the Supreme Court in 1942. There the petitioner alleged that he had pleaded guilty at his trial because a named member of the F.B.I. had threatened that he would incite the public against the petitioner and cause him to be hanged if he did not plead guilty. The district court denied the petition as insufficient upon its face and was affirmed by the Circuit Court of Appeals, but the Supreme Court reversed, holding that if the petitioner could establish these allegations as true, then his conviction was void and he was entitled to his freedom, even though the proof of the matter was entirely outside the knowledge and record of the trial court. The court went on to say that "a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession."⁶³ Although the right here involved is really the

⁵⁷ *Graham v. Squier*, *supra*, note 27.

⁵⁸ *Matter of Moran*, 203 U. S. 96, 105 (1906).

⁵⁹ *Brown v. Mississippi*, 297 U. S. 278 (1935).

⁶⁰ *Waley v. Johnston*, 316 U. S. 101 (1941).

⁶¹ *McNabb v. U. S.*, 318 U. S. 332 (1942), *Chambers v. Florida*, 309 U. S. 227 (1939).

⁶² *Supra*, note 60.

⁶³ *Ibid.*, p. 104.

right against self-incrimination, the Supreme Court in its opinion does not even mention the phrase but places the case upon the ground that such a conviction is not "consistent with due process" and refers to *Chambers v. Florida*,⁶⁴ where a state conviction was assailed upon appeal because it was based upon a confession secured by third-degree methods. There the reversal had to be based upon an invasion of the right to "due process" as guaranteed by the Fourteenth Amendment.

This treatment by the Supreme Court lends support to Judge Miller's view, and it would seem to be safe to say that an infringement of the right of the accused not to bear witness against himself will only go to the jurisdiction of the court when the infraction is so fundamental as to render the whole proceedings a farce and a mockery of justice.

The guarantee of the Fourth Amendment against unreasonable searches and seizures is intimately connected with the right against self-incrimination and with the concept of due process of law.⁶⁵ Personal papers of the accused taken in violation of the Fourth Amendment, for example, could not be introduced against the accused without forcing him to give evidence against himself. But the rights guaranteed in each case are personal rights and they are normally held to be waived where they are not asserted at the trial and upon appeal.⁶⁶ However, if the petitioner can overcome the burden of proof and show that he did not waive his constitutional right, for reason of ignorance or disability, then the writ of habeas corpus will lie.

A careful distinction must be made between the situation where the evidence seized in violation of the Fourth Amendment or the confession secured by coercion is not introduced in evidence at the trial and where it is a material element in securing the conviction. Where the conviction does not rest on the prohibited matter, then the breach of the constitutional right is not grounds for habeas corpus. Thus though a confession be secured by third-degree methods, if the accused later voluntarily pleads guilty and the confession is never introduced at the trial, the judgment of conviction is good and a writ will not lie.⁶⁷ The

⁶⁴ *Supra*, note 61.

⁶⁵ *Bram v. U. S.*, 168 U. S. 532 (1897).

⁶⁶ *Price v. Johnston*, 125 F.(2d) 806 (C. C. A. 9th 1941), *cert. denied*, 316 U. S. 677 (1941), *Bozell v. Hudspeth*, 126 F.(2d) 585 (C. C. A. 10th 1942), *Moore v. Aderhold*, *supra*, note 21, *Hampson v. Smith*, 153 F.(2d) 417 (C. C. A. 9th 1945).

⁶⁷ *Waley v. Johnston*, 139 F.(2d) 117 (C. C. A. 9th 1943), *cert. denied*, 321 U. S. 779 (1944), *Blood v. Hunter*, 150 F.(2d) 640 (C. C. A. 10th 1945), *Widmer v. Johnston*, *supra*, note 45.

same should be true where evidence secured in violation of the Fourth Amendment is never introduced at the trial of the accused.

The rights secured under the Sixth Amendment are not afforded as broad protection as those under the Fifth, for a "criminal prosecution" is somewhat narrower in meaning than "in any criminal case," but the distinction is not significant in our limited inquiry. Moreover, in the matters we are discussing certain considerations are substantially similar in respect to infringement of each of the guaranteed rights, such as the matter of waiver and the element of the time the infraction took place, and, except as detailed below, a plea of guilty or a failure to assert his rights (by one who knows of them) impliedly waives those rights. Most infractions fall within this class and the limitation serves to bar many applications for habeas corpus.

As to the time element, it is clear that the accused need not be present at the grand jury hearings under either the Fifth or the Sixth Amendments,⁶⁸ nor are any of his constitutional rights prejudiced by any procedure at a preliminary proceeding since that is not constitutionally required in any event.⁶⁹ Furthermore, since there is no constitutional right to an appeal,⁷⁰ the inquiry by the writ of habeas corpus is limited to what occurred up to judgment and sentence. This severe limitation of the scope of the inquiry had not been acquiesced in by all courts,⁷¹ but it is certainly most sound on principle and is the view supported by a legion of authority.

The right to be confronted by adverse witnesses is not of great importance so far as collateral attack on the judgment is concerned.⁷² The requirements of speedy and public trial by an impartial jury⁷³

⁶⁸ *U. S. v. Thompson*, 144 F.(2d) 604 (C. C. A. 2d 1944), *cert. denied*, 323 U. S. 790 (1944).

⁶⁹ *Burall v. Johnston*, 146 F.(2d) 230 (C. C. A. 9th 1944).

⁷⁰ *Luckenbach v. U. S.*, 272 U. S. 533, 536 (1926), *Cobbledich v. U. S.*, 309 U. S. 323, 325 (1939), *Lovvorn v. Johnston*, 118 F.(2d) 704 (C. C. A. 9th 1941), *cert. denied*, 314 U. S. 607 (1941), *DeMaurex v. Swope*, 104 F.(2d) 758 (C. C. A. 9th 1939).

⁷¹ *Boylan v. Huff*, 121 F.(2d) 865, 872 (App. D. C. 1941), *cf.*, *Cochran v. Kansas*, 316 U. S. 255 (1941).

⁷² Since in the ordinary case the court will not proceed without the accused, and since voluntary absence from the trial after it has begun is generally a waiver, it is difficult to prove violation of this right. Although the rules against hearsay are related to the right, erroneous administration of them does not defeat jurisdiction of the trial court. *See Curtis v. Rives*, 123 F.(2d) 936 (App. D. C. 1941), *Burgess v. King*, 130 F.(2d) 761 (C. C. A. 8th 1942), *Moore v. Aderhold*, *supra*, note 21, *Diaz v. U. S.*, 223 U. S. 442 (1911), *Salinger v. U. S.*, 272 U. S. 542 (1926), *Gonzales v. People of Virgin Islands*, 109 F.(2d) 215 (C. C. A. 3d 1940), *U. S. v. Barracota*, 45 F. Supp. 38 (S. D. N. Y. 1942), *Fukunaga v. Territory of Hawaii*, 33 F.(2d) 396 (C. C. A. 9th 1929).

⁷³ These requirements may be summed up as follows: The trial should proceed in an orderly manner with reasonable dispatch (but failure of accused to insist on

cannot be enforced unless the infraction of them is sufficient to violate due process. The circuit courts of appeal⁷⁴ have followed the reasoning advanced by Judge Miller in *Dorsey v. Gill*, *supra*, and the Supreme Court has not so far chosen to upset that interpretation. An exhaustive search has failed to disclose a case where violation of the requirement that defendant be given compulsory process for obtaining his witnesses has been successfully established as a ground for relief under habeas corpus, though it has been alleged in a number of cases.⁷⁵ It is nevertheless clear that an actual infringement of this right will defeat the jurisdiction of the trial court.⁷⁶

The outstanding example of a specific right which may be protected by habeas corpus proceedings in the nature of a collateral attack on the judgment, apart from the general question of due process, is the right to counsel. Perhaps because the *Zerbst* case, *supra*, was first in point of time or because of the realization on the part of courts of the impossibility of a fair trial, in many cases, without counsel, more cases have been based upon this constitutional right than any other. The Sixth Amendment⁷⁷ provides that "In all criminal prosecutions, the accused

expedition at time of the delay is a waiver). *Ex parte Pickeral*, 44 F. Supp. 741 (N. D. Tex. 1942). *Bayless v. U. S.*, *supra*, note 36. It should be public but exclusion of spectators from trial for a sex crime would not defeat the court of jurisdiction. *Sawyer v. Duffy*, 60 F. Supp. 852 (N. D. Cal. 1945), but *cf.*, *Tanksley v. U. S.*, 145 F.(2d) 58 (C. C. A. 9th 1944), 156 A. L. R. 257. The jury should consist of twelve men, neither more nor less. *Patton v. U. S.*, 281 276 (1930), *Adams v. U. S. ex rel. McCann*, 317 U. S. 269 (1942), and see Rule 23, Federal Rules of Criminal Procedure. In regard to alternate jurors, *see* 28 U. S. C. A. 417(a), *Robinson v. U. S.*, 144 F.(2d) 392 (C. C. A. 6th 1944), *aff'd*, 324 U. S. 282 (1945), *rehearing denied*, 324 U. S. 889, 325 U. S. 895 (1945). The trial should be in the presence and under the supervision of a judge having the power to instruct the jurors as to the law and advise them as to the facts. *Capital Traction Co. v. Hof*, 174 U. S. 1 (1899). The verdict of the jury should be unanimous. *Maxwell v. Dow*, 176 U. S. 581, 586 (1900).

⁷⁴ *McMullen v. Squier*, 144 F.(2d) 703 (C. C. A. 9th 1944), *Eury v. Huff*, 141 F.(2d) 554 (C. C. A. 4th 1944), *Walker v. Chitty*, *supra*, note 25.

⁷⁵ *Smith v. Squier*, 136 F.(2d) 536 (C. C. A. 9th 1943), *Bell v. Johnston*, 152 F.(2d) 59 (C. C. A. 9th 1945), *Brown v. Johnston*, 126 F.(2d) 727 (C. C. A. 9th 1942), *In re Curtiss*, 36 F. Supp. 408 (D. C. 1941), *aff'd*, 123 F.(2d) 936 (App. D. C. 1941).

⁷⁶ Refusal of such process smacks of such prejudice upon the part of the court as to constitute denial of due process. *See* 18 U. S. C. A. 563, Rule 17, Federal Rules of Criminal Procedure, *Bridwell v. Aderhold*, 13 F. Supp. 253 (N. D. Ga. 1935), *aff'd*, 92 F.(2d) 748 (C. C. A. 5th 1937), *reversed* (on other grounds), 304 U. S. 458 (1938). But failure of accused to make it clear to the court that he wants process to be served upon a particular person is a waiver. *Smith v. Squier*, 136 F.(2d) 536 (C. C. A. 9th 1943), *Wallace v. Hunter*, *supra*, note 25. Moreover, the right is limited to reasonable demands which are not deliberately postponed until justice would be unnecessarily delayed. *Casebeer v. Hudspeth*, 121 F.(2d) 914 (C. C. A. 10th 1941), *Neufeld v. U. S.*, 118 F.(2d) 375, 385 (App. D. C. 1941), *cf.* *Paoni v. U. S.*, 281 Fed. 801 (C. C. A. 3d 1922).

⁷⁷ Although the right to counsel might be considered as protected by the Fifth Amendment due process clause as it is under the Fourteenth, there is no necessity

shall enjoy the right to have the Assistance of Counsel for his defense," which means that if the accused has no money to employ counsel and does not waive the right the court must appoint counsel for him.⁷⁸ But as we have already noted, an accused cannot have counsel forced upon him, and may, if he chooses, defend himself⁷⁹ or offer no defense whatever, but the waiver of the right to counsel must be intelligent and understanding.⁸⁰ This is true regardless of the plea which the accused may make and a plea of guilty is only a circumstance which serves to indicate a waiver of the right.⁸¹ The reasoning of the Supreme Court was made clear in *Williams v. Kaiser*⁸² where the court said:

Like other judgments, a judgment based on a plea of guilty is not of course to be lightly impeached in collateral proceedings. But a plea of guilty to a capital offense made by one who asked for counsel but could not obtain one and who was "incapable adequately of making his own defense" stands on a different footing. Robbery in the first degree by means of a deadly weapon is a capital offense in Missouri. The law of Missouri has important distinctions between robbery in the first degree, robbery in the second degree, grand larceny, and petit larceny. These involve technical requirements of the indictment or information, the kind of evidence required for conviction, the instructions necessary to define the several elements of the crime, and the various defenses which are available. These are a closed book to the average layman. These considerations underscore what was said in *Powell v. Alabama*: "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime he is incapable, generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one." Those observations are as pertinent in connection with the ac-

for recurring to it. But cf. *Sanders v. Allen*, 100 F.(2d) 717 (App. D. C. 1938), *Hall v. Johnston*, *supra*, note 53, *Coates v. Lawrence*, 46 F. Supp. 414, 422 (S. D. Ga. 1942), *aff'd*, 131 F.(2d) 110 (C. C. A. 5th 1942), *cert. denied*, 318 U. S. 759 (1943).

⁷⁸ "If the defendant appears in court without counsel the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel." Rule 44, Federal Rules of Criminal Procedure. This rule restates existing law. *Glasser v. U. S.*, 315 U. S. 60 (1942), *Johnston v. Zerbst*, *supra*, note 40; *Walker v. Johnston*, *supra*, note 7. See *Betts v. Brady*, *supra*, note 51, and the annotation in 146 A. L. R. 378.

⁷⁹ "In all the courts of the United States the parties may plead and manage their own causes personally." 28 U. S. C. A. 394.

⁸⁰ Cases cited, *supra*, note 78, and *Carter v. Illinois*, *supra*, note 47.

⁸¹ *Carter v. Illinois*, *id.*, *Rice v. Olsen*, *Williams v. Kaiser*, *supra*, note 10.

⁸² *Carter v. Illinois*, *supra*, note 47.

cused's plea as they are in the conduct of a trial. The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate.

And so, a failure to appoint counsel upon request would clearly be a breach of the constitutional rights of the accused even though he later pleads guilty—but a failure to advise him of his right to counsel, where he is aware of his rights, will not be prejudicial.⁸³ However, a failure to request the court to appoint counsel is not, alone, a waiver,⁸⁴ for the accused must be aware of his rights and understand his situation before he can waive his constitutional right to the assistance of counsel.

Where the accused pleads guilty, however, the Ninth Circuit Court of Appeals has often held that he thereby impliedly waives his right to the assistance of counsel, and upon a petition for a writ of habeas corpus the petitioner must rebut this presumption.⁸⁵ Other circuits have not gone so far, feeling that the implication of the Supreme Court decisions will not permit such a presumption.⁸⁶ There is, however, actually no difference in these holdings, since the burden of proof is always upon the petitioner and the result will be the same whatever language is employed in the rationale.

It is safe to conclude that in any case, where in the trial of an accused, counsel was not appointed to represent him, whether or not he pleaded guilty, there is an excellent chance of upsetting the judgment through the offices of a writ of habeas corpus, unless the record of the trial clearly shows that the accused was a mature, well-educated, intelligent man, fully advised of his rights, who, at the time of the trial, acted in such a manner as to clearly indicate his intention to waive the right to have counsel to advise him.

The right to be represented by counsel is substantial, and the law

⁸³ *O'Keith v. Johnston*, 129 F.(2d) 889 (C. C. A. 9th 1942), 146 F.(2d) 230 (C. C. A. 9th 1944).

⁸⁴ "[Waiver] must depend in each case upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused." *Johnston v. Zerst*, *supra*, note 40.

⁸⁵ *Michener v. Johnston*, 141 F.(2d) 171 (C. C. A. 9th 1944), *Widmer v. Johnston*, *supra*, note 45, *O'Keith v. Johnston*, *supra*, note 83, *Walker v. Chitty*, *supra*, note 44, *Harpin v. Johnston*, 109 F.(2d) 434 (C. C. A. 9th 1944).

⁸⁶ *Evans v. Rives*, 126 F.(2d) 633 (App. D. C. 1942) and cases there cited.

will not be satisfied by a mere sham appointment.⁸⁷ However, where the accused is represented by counsel of his own choice, he will not, except in most extraordinary circumstances,⁸⁸ be heard to complain.⁸⁹ But where counsel is appointed to represent him, the representation so afforded must be "effective,"⁹⁰ i.e., able, efficient, competent, and honorable. At the same time it is clear that no right of the accused under the Sixth Amendment is violated unless the trial judge, in appointing counsel, knew, or had reason to know, that the attorney appointed would not properly represent the accused. "All the Amendment requires is that the accused shall have the assistance of counsel."⁹¹ "It does not mean that the constitutional rights of the defendant are impaired by counsel's mistakes subsequent to a proper appointment."⁹² Every attorney makes mistakes whether he be young and inexperienced or old and wise; but any attorney admitted to the bar and appointed by the court is presumed to be competent,⁹³ and he is normally as well able to represent the accused as any other, for, theoretically at least, our courts of justice decide cases upon their merits and not upon the abilities of opposing counsel.⁹⁴

However, the right to counsel is inextricably tied in with the whole concept of due process of law and no matter how skilled the attorney so appointed may be, if it should become apparent to the trial judge that he is not diligently defending the accused, then it is the duty of the trial court to stop the trial, appoint another attorney and, if neces-

⁸⁷ *Avery v. Alabama*, 308 U. S. 444, 446 (1940).

⁸⁸ As perhaps where the prisoner later discovered evidence that proved that his own attorney, the judge, and the prosecuting attorney conspired to convict him and in collusion did effect such conviction.

⁸⁹ *Andrews v. Robertson*, 145 F.(2d) 101 (C. C. A. 5th 1944), *cert. denied*, 324 U. S. 874 (1945), *Pierce v. Hudspeth*, 126 F.(2d) 337 (C. C. A. 10th 1942), *Hudspeth v. McDonald*, 120 F.(2d) 962 (C. C. A. 10th 1941), *cert. denied*, 314 U. S. 617 (1941), *Ex parte Haumsesch*, 82 F.(2d) 558 (C. C. A. 9th 1936).

⁹⁰ *Tomkins v. Missouri*, 323 U. S. 485 (1945), *Glasser v. U. S.*, *supra*, note 78, *Powell v. Alabama*, 287 U. S. 45 (1932), *Johnson v. U. S.*, 110 F.(2d) 562 (App. D. C. 1940), *Thomas v. District of Columbia*, 90 F.(2d) 424 (App. D. C. 1937).

⁹¹ "Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours." 18 U. S. C. A. 563. This provision confers a right which is only statutory and its violation does not give a ground for the writ. *See Crum v. Hunter*, 151 F.(2d) 359 (C. C. A. 10th 1945).

⁹² *Jones v. Huff*, 152 F.(2d) 14, 15 (App. D. C. 1945), *Crum v. Hunter*, *supra*, note 91, *Diggs v. Welch*, 148 F.(2d) 667, 669 (App. D. C. 1945), *U. S. v. Gutterman*, 147 F.(2d) 540 (C. C. A. 2d 1945), *Conley v. Cox*, 138 F.(2d) 786 (C. C. A. 8th 1943).

⁹³ *See Achtien v. Dowd*, 117 F.(2d) 989, 992 (C. C. A. 7th 1941), for an excellent discussion.

⁹⁴ *Ibid.*, p. 993

sary, grant a new trial. A failure in this duty by the trial judge would violate our fundamental ideas of fairness and right, would render the whole trial a farce and a mockery, and would, therefore, be in violation of the due process clause of the Fifth Amendment. Taking the two constitutional provisions together we can see the concept of "effective counsel" much more clearly. It is apparent that the court may not appoint a single attorney to represent more than one co-defendant where their interests may conflict, nor impose any other burden upon the attorney which will prevent him from presenting the best defense possible.⁹⁵ Even if counsel is competent, his representation of the accused cannot be "effective" unless he is given sufficient time to prepare his case,⁹⁶ and a proper opportunity to communicate and consult privately with the accused.⁹⁷ To deny counsel either is to deprive the accused of "effective" representation and will be grounds for the subsequent issuance of the writ of habeas corpus. But a mere showing that the counsel appointed committed some error in the trial of the case does not render the judgment of conviction void, nor require the issuance of the writ.⁹⁸ The petitioner must show that the court or the prosecution has in some way participated in the injustice complained of to invoke the due process clause. Otherwise the errors of counsel can only be part of the risk of litigation.

The time aspect of the scope of inquiry by habeas corpus was considered above in connection with the right of confrontation and grand jury hearings under Amendments Five and Six, as to whether the inquiry could go into the facts of the appeal or probe into the procedure at the preliminary hearings. This problem has been most fully considered with respect to the right to counsel, which has been declared to be the right to have the assistance of counsel "at every step in the proceeding."⁹⁹ This statement is too broad. A failure to appoint counsel at a preliminary proceeding does not violate either due process

⁹⁵ *Glasser v. U. S.*, *supra*, note 78, *Noble v. Eicher*, 143 F.(2d) 1001 (App. D. C. 1944), *see also* Mr. Justice Frankfurter, concurring in *Malinski v. N. Y.*, 324 U. S. 401 (1945), and the annotation in 148 A. L. R. 183. *Cf. Farris v. Hunter*, 144 F.(2d) 63 (C. C. A. 10th 1944).

⁹⁶ *House v. Mayo*, *supra*, note 10; *Avery v. Alabama*, 308 U. S. 444 (1940), *cf. Powell v. Alabama*, *supra*, note 90.

⁹⁷ "and they shall have free access to him at all seasonable hours." *Supra*, note 91. See annotations in 23 A. L. R. 1382, 54 A. L. R. 1225.

⁹⁸ *Dorsey v. Gill*, *supra*, note 56, *cf. Thompson v. Ohio*, 146 F.(2d) 95 (C. C. A. 6th 1944), *cert. denied*, 324 U. S. 869 (1945), *Andrews v. Robertson*, 145 F.(2d) 101 (C. C. A. 5th 1944), *cert. denied*, 324 U. S. 874 (1945), and the cases cited *supra*, note 92.

⁹⁹ *Powell v. Alabama*, *supra*, note 90.

under the Fifth Amendment nor the right to counsel under the Sixth, since a preliminary hearing is not required, and in any event the accused is not thereby, in any true sense, prejudiced.¹⁰⁰ Where the accused pleads guilty he is entitled to counsel at the arraignment, but if he pleads not guilty, and subsequently counsel is appointed to represent him at the trial, the error of refusing him counsel at the arraignment is held to be cured, either upon the theory of implied waiver or upon the theory of the absence of prejudice.¹⁰¹ The absence of counsel during the course of the trial proper, for any substantial period of time, is presumed to be prejudicial and violative of the constitutional rights of the accused, but a very short absence which could not have prejudiced the accused will not defeat the jurisdiction of the trial court.

Where the attorney is absent when the jury returned its verdict, the accused is not prejudiced,¹⁰² but where the absence occurs at the time when sentence is pronounced, the attorney may in some way be of assistance to the court—may be able to protect rights of the accused—and if the trial then proceeds, it is without jurisdiction to sentence the accused.¹⁰³ But in such a case, upon a writ of habeas corpus, the prisoner will not be discharged but only remanded to the trial court for re-sentencing. This procedure is of doubtful validity, but since the various circuits are independent jurisdictions, it is the law for prisoners incarcerated at Alcatraz, Columbia, and McNeil Island.¹⁰⁴

Upon the basis of comments already made it would seem that here the constitutional guaranty of the right to counsel probably stops—at least insofar as it is protected by the writ of habeas corpus.¹⁰⁵ It has been asserted with some success that an accused is entitled to counsel in making an appeal, but to many appellate judges this suggestion has

¹⁰⁰ *U. S. v. McDonnell*, 130 F.(2d) 1012 (C. C. A. 7th 1942), *Burall v. Johnston*, *supra*, note 69; *cf. Anderson v. Treat*, 172 U. S. 24 (1898).

¹⁰¹ *In re Reed*, 158 F.(2d) 323 (App. D. C. 1946).

¹⁰² *Kent v. Sanford*, 121 F.(2d) 216 (C. C. A. 5th 1941), *cert. denied*, 315 U. S. 799 (1942), *Lovvorn v. Johnston*, *supra*, note 70.

¹⁰³ *Coates v. Lawrence*, *supra*, note 77, *Wilfong v. Johnston*, 156 F.(2d) 507 (C. C. A. 9th 1946). Notice that these cases conflict in principle with the cases cited *supra*, note 102, but this inconsistency seems to be settled. The better rule would seem to be that in all cases where counsel is temporarily absent, the accused must show that he was prejudiced and that he did not acquiesce in the attorney's absence. *Lovvorn v. Johnston*, *supra*, note 70; *Taylor v. Hudspeth*, 113 F.(2d) 825 (C. C. A. 10th 1940), *Moore v. Aderhold*, *supra*, note 21, *DeMaurez v. Swope*, *supra*, note 70.

¹⁰⁴ *Wilfong v. Johnston*, *supra*, note 103.

¹⁰⁵ *Dorsey v. Gill*, *supra*, note 56 at p. 877, *Osborne v. Johnston*, 120 F.(2d) 947 (C. C. A. 9th 1941), *Lovvorn v. Johnston*, *supra*, note 70; *Errington v. Hudspeth*, 110 F.(2d) 384 (C. C. A. 10th 1940), *cert. denied*, 310 U. S. 638 (1940), *Moore v. Aderhold*, *supra*, note 21, *DeMaurez v. Swope*, *supra*, note 70.

seemed improper and unsound in law. The right to take an appeal has been said many times to be only a "matter of grace" and not guaranteed by due process.¹⁰⁶ Nonetheless, it has been argued that Congress by providing for appeals has set up a procedure and has established a form of due process which every defendant is entitled to exercise. That is, the appeal is but a "step in the proceedings" and the accused, therefore, has a right to the assistance of counsel in taking of an appeal.¹⁰⁷ Even if the argument be accepted, it is necessary for the petitioner to show that he was prejudiced, *i.e.*, that there was some reversible error committed in the trial of his case, else the court will not issue the writ to set aside the valid judgment.¹⁰⁸

In summary then, we may state the limitations upon the use of habeas corpus for collateral attack upon federal judgments as follows:

1. The inquiry is limited in time to that period beginning with the arraignment up to and including judgment and sentence, excluding all things that went before, such as procedure before the grand jury or a preliminary hearing, and all things that come after, such as the conduct of an appeal.

2. The writ may not be used as a substitute for an appeal, to set aside a judgment for mere errors of law, though where administrative action, as distinguished from a judgment, is involved, it may be a device for judicial review (subject to limitations outside the scope of this article)

3. The inquiry is limited in substance to confinements which are presently illegal because the sentencing court:

- (a) lacked jurisdiction from the beginning; or
- (b) having jurisdiction in the beginning has proceeded to judgment in a manner which not only violates some constitutionally guaranteed right, but is obviously so unfair and unjust as to deny due process of law; or
- (c) having jurisdiction in the beginning has denied the accused the "effective" assistance of counsel.

¹⁰⁶ *Cobbledich v. U. S.*, *supra*, note 70, at p. 325, *U. S. v. Sanges*, 144 U. S. 310 (1892).

¹⁰⁷ *Cochran v. Kansas*, *supra*, note 71, *Frank v. Mangum*, *supra*, note 8, *Boykin v. Huff*, *supra*, note 71, and *see* Judge Denman, dissenting in *Thompson v. Johnston*, 160 F.(2d) 374 (C. C. A. 9th 1947).

¹⁰⁸ *Thompson v. Johnston*, *id.*, *Miller v. Sanford*, 59 F. Supp. 812 (N. D. Ga. 1945), *aff'd*, 150 F.(2d) 637 (C. C. A. 5th 1945), *cert. denied*, 326 U. S. 787 (1946).

PROCEDURE

So far we have confined our inquiries to the substantive rights that can be protected with the writ of habeas corpus. The remainder of this article is to be concerned with matters of procedure—the requirements of the petition as to form, the action of the district court upon receipt of a petition, and the difficulties presented upon appeal.

Most of the problems have arisen out of the fact that in nearly all cases the convict is not represented by counsel but instead acts for himself. Because he is generally an uneducated layman, the courts have found it impossible to demand of him the “technical niceties”¹⁰⁹ of pleading, and therefore a petition for habeas corpus need not be in any particular form though certain essentials, succinctly set out by the statute, must be present.¹¹⁰ The petition must be in writing, signed and verified by the person detained,¹¹¹ setting forth all known facts of the detention, and addressed to any judge or court authorized by law to issue the writ.¹¹²

A petition directed in the first instance to the Supreme Court or to any judge thereof will be denied without prejudice and the petitioner referred to the appropriate district court.¹¹³ A petition directed, in the first instance, to the circuit court of appeals will be dismissed for want of jurisdiction because of lack of statutory power. If directed, however, to a specific judge thereof, he may act upon it himself,¹¹⁴ or he may refer it to the district court.¹¹⁵ Finally, where a petition is directed

¹⁰⁹ *Tomkins v. Missouri*, *supra*, note 46; *Walker v. Johnston*, *supra*, note 7, *Sisquoc Ranch Co. v. Roth*, 153 F.(2d) 437 (C. C. A. 9th 1946).

¹¹⁰ “Application for writ of habeas corpus shall be made into the court of justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.” 28 U. S. C. A. 454. *See also Dorsey v. Gill*, *supra*, note 56, at pp. 867-9.

¹¹¹ The “next friend” of the prisoner may verify the complaint if it shows why it was not verified by the person detained and what relation the “next friend” bears to the prisoner, to the satisfaction of the court. *U. S. ex rel. Bryant v. Houston*, 273 Fed. 915 (C. C. A. 2d 1921), *U. S. v. Watchorn*, 164 Fed. 152 (S. D. N. Y. 1908). *But see McDonald v. Hudspeth*, 113 F.(2d) 984 (C. C. A. 10th 1940), *cert. denied*, 311 U. S. 683 (1940).

¹¹² Three statutory provisions are controlling. One of them gives the Supreme Court and the district courts power to issue the writ. The second gives such power to any judge of the district, circuit, or supreme courts within their respective jurisdictions. The third confers upon the various courts a general power to issue necessary and proper writs. 28 U. S. C. A. 451, 452, and 377.

¹¹³ *Ex parte Hawk*, *supra*, note 10; *Ex parte Henry Hawk*, 318 U. S. 746 (1943).

¹¹⁴ *E.g.*, *Johnston v. Wright*, 137 F.(2d) 914 (C. C. A. 9th 1943).

¹¹⁵ *In re Gersing*, 145 F.(2d) 481 (App. D. C. 1944), *Sweetney v. Johnston*, 121 F.(2d) 445 (C. C. A. 9th 1941), *cert. denied*, 314 U. S. 607 (1941), *Brosius v.*

to a specific district judge (where there is more than one judge in the district), it may be acted upon by him personally or may be placed upon the court calendar and acted upon by the judge who happens to draw it, for the petitioner has no vested right to have a particular judge hear his application.¹¹⁶ It follows, therefore, that the best practice in the ordinary case is to present the petition in the first instance to the district court for the district wherein the petitioner is confined.

When the petition is presented to the district judge for his consideration, he has the duty to consider it carefully, exercising his sound discretion and disregarding "technical niceties,"¹¹⁷ and to "forthwith award the writ unless it appears from the petition itself that the party is not entitled thereto,"¹¹⁸ or unless it appears that the time for appeal has not passed, or that the petitioner has another adequate remedy.¹¹⁹

From ancient practice and judicial interpretation certain rules have been evolved to aid the judge in satisfying the requirements of the statute. In a doubtful case, he may require the petitioner to amend his petition so as to show the facts more clearly,¹²⁰ or to show whether a prior application was made, and if so, what action was had upon it;¹²¹ or he may issue an order to show cause why the writ should not issue, and then, taking the petition, the answer, and the reply together, determine whether the petition for the writ is sufficient upon its face.¹²² In determining the sufficiency of the petition all of the facts alleged by the petitioner must be regarded as true, no matter how farfetched and unlikely they may appear to be.¹²³ So if the petition alleges facts which make the confinement presently illegal (keeping in mind the principles we have previously discussed), the judge *must* issue the writ and give the prisoner an opportunity to prove his allegations at a hearing.¹²⁴

Botkin, 110 F.(2d) 49 (App. D. C. 1940), Whittaker v. Johnston, 85 F.(2d) 199 (C. C. A. 9th 1936), *Ex parte* Haumesch, 82 F.(2d) 558 (C. C. A. 9th 1936), *cf.* Banks v. O'Grady, 113 F.(2d) 926 (C. C. A. 8th 1940).

¹¹⁶ Bural v. Johnston, *supra*, note 69; Snow v. Roche, *supra*, note 10; Rutkowski v. St. Sure, 143 F.(2d) 715 (C. C. A. 9th 1944).

¹¹⁷ See note 109.

¹¹⁸ 28 U. S. C. A. 455.

¹¹⁹ Boykin v. Huff, *supra*, note 71, Walker v. Chitty, *supra*, note 44.

¹²⁰ Holiday v. Johnston, 313 U. S. 342, 350 (1941), Dorsey v. Gill, *supra*, note 56.

¹²¹ Salinger v. Loisel, *supra*, note 29; Dorsey v. Gill, *supra*, note 56.

¹²² *Ex parte* Hull, 312 U. S. 546 (1941), Walker v. Johnston, *supra*, note 7, at p. 284.

¹²³ *Ibid.*, at p. 287.

¹²⁴ *Ibid.*, at p. 285, *see also* Waley v. Johnston, *supra*, note 60.

The doctrine of *res judicata* is not applicable to habeas corpus cases,¹²⁵ but the Ninth Circuit, which has several large penitentiaries and has been especially burdened with the work of "prison lawyers" who make a game of filing petitions to while away the dreary time in prison, has been compelled to advance a substitute for *res judicata*. In *Swihart v. Johnston*,¹²⁶ the rule was advanced that a previous application for a writ of habeas corpus was grounds for the district court to deny, in the exercise of its sound discretion, a subsequent petition, for the petitioner in withholding the information (relied upon in the second petition) from the first petition was making an "abusive use" of the writ within the meaning of the language in *Salinger v. Loisel*¹²⁷ where the Supreme Court said:

In practice the rules we here have outlined will accord to the writ of habeas corpus its recognized status as a privileged writ of freedom, and yet make against an abusive use of it. As a further safeguard against abuse the court, if not otherwise informed, may on receiving an application for the writ require the applicant to show whether he has made a prior application and, if so, what action was had on it.

Here the prior refusal to discharge was by a court of coordinate jurisdiction and was affirmed in a considered opinion by a Circuit Court of Appeals. Had the District Court disposed of the later application on that ground, its discretion would have been well exercised and we should sustain its action without saying more.

Perhaps with the thought that the *Salinger* case, *supra*, was still good law, the Supreme Court refused to grant certiorari in the *Swihart* case, and when in several subsequent cases the doctrine was reaffirmed, continued to refuse to take a position.¹²⁸ However, cases like *Waley v. Johnston*¹²⁹ and *Robinson v. Johnston*¹³⁰ seem to indicate that the *Swihart* and companion cases were incorrectly decided. Nonetheless,

¹²⁵ *Ibid.*, at p. 105, *Salinger v. Loisel*, *supra*, note 29.

¹²⁶ 150 F.(2d) 721 (C. C. A. 9th 1945), *cert. demed.*, 327 U. S. 789 (1946). See the opinion of Justice Field sitting as a Circuit Judge in *Ex parte Cuddy*, 40 Fed. 62 (D. C. Cal. 1889) for the origin of the reasoning of the *Swihart* case.

¹²⁷ *Supra*, note 29. The court reaffirmed two considerations as appropriate when there has been a refusal to discharge on a prior application based on similar grounds; the character of the court or officer to whom the first application was made and the fullness with which it was considered. The rule against application of *res judicata* was said to have been altered by the introduction of the right to appellate review of refusal to discharge on habeas corpus.

¹²⁸ *Garrison v. Johnston*, 151 F.(2d) 1011 (C. C. A. 9th 1945), *cert. demed.*, 66 Sup. Ct. 1009 (1946), *Wilson v. Johnston*, 154 F.(2d) 111 (C. C. A. 9th 1946), *cert. demed.*, 66 Sup. Ct. 1366 (1946), *McMahon v. Johnston*, 157 F.(2d) 915 (C. C. A. 9th 1945), *cert. demed.*, 67 Sup. Ct. 1197 (1947). Cf. *Kerr v. Squier*, 151 F.(2d) 308 (C. C. A. 9th 1945).

¹²⁹ *Supra*, note 124.

¹³⁰ 316 U. S. 649 (1941), see also *Walker v. Johnston*, *supra*, note 7

the Ninth Circuit, sitting en banc, in *Price v. Johnston*,¹³¹ has just reaffirmed its rule, although the strong dissents filed by Judge Denman and Judge Stephens demonstrate the views held by many other federal judges.

If the petition is sufficient on its face, and no problem is raised by denial of a previous application based on similar grounds, the judge must issue the writ.¹³² As already noted the writ is an order of the court, to the person in whose custody the petitioner is detained, requiring him to produce the body of the petitioner in court within a time set by law.¹³³ Upon making the return, the respondent shall produce the petitioner and shall certify to the court the true cause of the detention.¹³⁴ The court shall then set a day, not more than five days thereafter, for a hearing of the facts.¹³⁵ Upon the hearing the petitioner must be actually present before the district court, and a hearing before a commissioner within the prison will not satisfy the requirements of the statute.¹³⁶ The judge must hear the evidence, the testimony, and the arguments and then proceed in a summary way to determine the facts of the case.¹³⁷ Since the habeas corpus is a civil proceeding,¹³⁸ the guarantees of the Sixth Amendment are not applicable and the petitioner may be required to testify,¹³⁹ is not entitled to a jury trial,¹⁴⁰

¹³¹ 161 F.(2d) 705 (C. C. A. 9th 1947), *cert. granted*, 67 Sup. Ct. 1757 (1947). The dissenting opinions, 161 F.(2d) 705, 708, 711 are able briefs in support of petitioner, but if reversal follows, the settlement of many meritorious disputes will be seriously delayed by the flood of petitions of proven scoundrels. These "repeaters" cannot lawfully be restrained by the prison authorities from this kind of attempt at self-deliverance, *Ex parte Hull*, *supra*, note 122, and many wardens encourage such activities as a salutary diversion. For example, Harmon Waley (who pleaded guilty to kidnapping the Weyerhaeuser boy), at present confined in Alcatraz, has just submitted his fifteenth petition, and one prisoner submitted fifty petitions in five years. *Dorsey v. Gill*, *supra*, note 56. Whatever the strength of the *Swihart* rule, or the outcome of the pending review, it seems that a practical adjustment ought to be made in terms of discretion of the deciding court to determine whether the prisoner has acted with due diligence to bring the matter on which he rests his application to the attention of the court. *See Salinger v. Loisel*, *supra*, note 127. Appellate review should be confined to abuse of such discretion.

¹³² *See* note 124.

¹³³ Three, ten, and twenty days, depending upon distances. 28 U. S. C. A. 456.

¹³⁴ 28 U. S. C. A. 457, 458.

¹³⁵ The petitioning party may request a longer time. 28 U. S. C. A. 459. It is not necessary that the hearing be completed within five days, but only that it be begun. *O'Keith v. Johnston*, *supra*, note 83.

¹³⁶ *Holiday v. Johnston*, *supra*, note 120.

¹³⁷ 28 U. S. C. A. 461.

¹³⁸ *Ex parte Tom Tong*, 108 U. S. 556 (1883), *Burgess v. King*, 130 F.(2d) 761 (C. C. A. 8th 1942). *See* extensive citation of authority in note 77 of *Dorsey v. Gill*, *supra*, note 56, at p. 870.

¹³⁹ *King v. Smith*, 158 F.(2d) 715 (C. C. A. 9th 1946).

¹⁴⁰ *O'Keith v. Johnston*, *supra*, note 83.

is not entitled to confront the witnesses against him (can use depositions),¹⁴¹ and is not entitled to appointment of counsel as a matter of right,¹⁴² though the court may appoint counsel if it so desires.

Moreover, since the petitioner is making an attack upon a judgment of record which is presumed to be valid, the burden of proof is upon him to prove his allegations by a preponderance of the evidence. The petitioner's own unsupported statements will rarely, if ever, sustain that burden and as a practical matter very few petitioners can ever prove their usually wishful allegations.

Although the field of habeas corpus is expressly excluded from the operation of the Federal Rules of Civil Procedure except upon appeal,¹⁴³ the statutes controlling the procedure are not inconsistent with Rule 52(a) (as to findings of fact) and it has therefore been considered as applicable and controlling. The district judge has therefore the duty to make findings of fact, and if he fails to do so, the appellate court may send the case back for findings.¹⁴⁴ However, it is immaterial whether these findings of fact are correctly labeled or not. They may be contained in the conclusions of law or in an opinion by the trial judge, and it is enough that the material facts are determined.¹⁴⁵

Having held the hearing, determined the facts of the case, and made his findings of fact, the district judge must then dispose of the petitioner "as law and justice require."¹⁴⁶ If the allegations are untrue and the confinement of the petitioner is not shown to be unlawful, then the judge should forthwith remand him to the custody of the respondent warden. If, on the other hand, the petitioner has borne the burden of proof and proved his allegations, the judge should do what the law seems to require in the particular case. Normally where a prisoner has shown that the conviction was void because his constitutional rights were violated in the course of the trial, the court will remand the prisoner to confinement for a limited time to give the authorities an

¹⁴¹ *Lewis v. Johnston*, 112 F.(2d) 451 (C. C. A. 9th 1940) and cases there cited. Cf. *Burgess v. King*, *supra*, note 138.

¹⁴² *King v. Smith*, *supra*, note 139; *Hodge v. Huff*, 140 F.(2d) 686 (App. D. C. 1944), *Dorsey v. Gill*, *supra*, note 56; *Brown v. Johnston*, 91 F.(2d) 370 (C. C. A. 9th 1937), *Benton v. Hill*, 72 F.(2d) 827 (App. D. C. 1926), cf. *Potter v. Dowd*, 146 F.(2d) 244 (C. C. A. 7th 1944).

¹⁴³ Rule 81.

¹⁴⁴ *Michener v. Johnston*, *supra*, note 85, *Curtiss v. Rives*, *supra*, note 72, *Hall v. Johnston*, 91 F.(2d) 363 (C. C. A. 9th 1937).

¹⁴⁵ *Johnston v. Wright*, *supra*, note 114, *O'Keith v. Johnston*, *supra*, note 83, at p. 890.

¹⁴⁶ See 28 U. S. C. A. 461, which provides for a summary manner of determination and disposition of "the party as law and justice require."

opportunity to institute the necessary proceedings to try him over again.¹⁴⁷ In the case of a defective sentence, it may remand him to the sentencing court for resentencing.¹⁴⁸ Of course, where he has served the full lawful period of his confinement and is now entitled to his freedom, he will be immediately released.¹⁴⁹

After the district court has rendered its decision in the matter, either the petitioner or the respondent may appeal to the Circuit Court of Appeals.¹⁵⁰ If the decision was against the respondent and he takes an appeal, the prisoner is remanded to confinement until the appeal is decided.

On appeal the Circuit Court of Appeals may appoint counsel to represent petitioner but is not in any sense bound to.¹⁵¹ Nor is the petitioner entitled to appear and represent himself. Many prisoners wishing to present their own cases before the appellate court have relied upon 28 U. S. C. A. 394, which provides that a party may manage and plead his own cause personally, and several were brought before the Circuit Court of Appeals for the Ninth Circuit for that purpose.¹⁵² However, the court sitting en banc in *Price v. Johnston*,¹⁵³ held that the appellate court has no power to issue such an order. If in some way the issuing of a writ of habeas corpus to bring the prisoner before it is "in aid of its appellate jurisdiction," then the appellate court would have the power,¹⁵⁴ but the court could not see that oral argument by the petitioner was in any way necessary to the exercise of jurisdiction upon his appeal. It now is clear that a convict cannot get out of prison to argue his own case upon appeal.

Upon appeal the findings of the district court as to the facts will not be set aside unless clearly erroneous, this rule being presently based upon the Federal Rules of Civil Procedure, Rule 52(a)¹⁵⁵ It follows therefore that the chief bone of contention in the appellate courts is

¹⁴⁷ See *Mitchell v. Youell*, 130 F.(2d) 880 (C. C. A. 4th 1942), *McCleary v. Hudspeth*, 124 F.(2d) 445 (C. C. A. 10th 1941), *cert. denied*, 316 U. S. 670 (1942).

¹⁴⁸ *Wilfong v. Johnston*, *supra*, note 103, *cf. Terrell v. Biddle*, 139 F.(2d) 32 (C. C. A. 8th 1943), *cert. denied*, 321 U. S. 794 (1944).

¹⁴⁹ *Johnston v. Wright*, *supra*, note 114.

¹⁵⁰ 28 U. S. C. A. 463.

¹⁵¹ *Pyle v. Johnston*, 136 F.(2d) 59 (C. C. A. 9th 1943), *Dorsey v. Gill*, *supra*, note 56, at p. 870. Most appeals are taken in forma pauperis and are governed by the requirements of 28 U. S. C. A. 832 *et seq.* See *Thiel v. So. Pac. R. R.*, *supra*, note 31, and *Smith v. Johnston*, 109 F.(2d) 152 (C. C. A. 9th 1946).

¹⁵² *Giles, King and Price* in cases cited *supra*, notes 131, 139 and *Giles v. U. S.*, 157 F.(2d) 588 (C. C. A. 9th 1946).

¹⁵³ 159 F.(2d) 234 (C. C. A. 9th 1947).

¹⁵⁴ See note 112.

¹⁵⁵ *Davis v. Johnston*, 157 F.(2d) 64 (C. C. A. 9th 1946), *Albert v. Patterson*,

as to what allegations of fact are sufficient to require the issuance of the writ, and most cases appealed are those where the petition for the writ was denied without a hearing. Although petitioners have taken many such appeals successfully, it is only very rarely that the petitioner can sustain the burden of proof when he faces the trial judge at the hearing.¹⁵⁶

The petitioner often makes statements of fact in his brief upon appeal that supplement the findings of fact or the allegations made in his petition. Where the district court has held a hearing and made findings of fact, these additions are to be ignored. But where the district court has denied the petition as being insufficient upon its face, the question arises whether the petitioner should be permitted to amend his petition. The decisions have not always faced the problem resolutely and the law is not entirely certain. The normal policy of the law for the orderly administration of justice would require that the petitioner be restricted upon appeal to the facts alleged in his petition to the court below; but in habeas corpus matters, especially where the petitioner represents himself, the policy of the law requires that all formalities shall be dispensed with in order to give swift relief where required. The circuit courts have so far, however, generally refused to permit such amendments, and to the writer at least it seems clear that the petitioner should be limited upon appeal to those matters which the district court had before it.¹⁵⁷

Review of the decision of the Circuit Court of Appeals may be had by writ of certiorari to the Supreme Court exactly as in other cases,¹⁵⁸ and in a very exceptional case the Supreme Court might be persuaded to grant an original writ of habeas corpus. The present Supreme Court has seemed inclined to review many more cases than their relative importance would seem to justify, but he would be a hardy protagonist who would minimize the value of careful supervision of the administration of this great writ.

155 F.(2d) 429 (C. C. A. 1st 1946), *Alexander v. Johnston*, 137 F.(2d) 712, 713 (C. C. A. 9th 1943), *Kelly v. Johnston*, 128 F.(2d) 793, 794 (C. C. A. 9th 1942), *cert. denied*, 317 U. S. 699 (1943).

¹⁵⁶ For an example see *Waley v. Johnston* 38 F. Supp. 408 (Cal. 1941), petition denied without a hearing; *affirmed*, 124 F.(2d) 587 (C. C. A. 9th 1941), *reversed*, 316 U. S. 101 (1942), hearing held as ordered and facts found (unreported) and *Waley* remanded to prison, *affirmed*, 139 F.(2d) 117 (C. C. A. 9th 1943), *cert. denied*, 321 U. S. 779 (1944).

¹⁵⁷ *Crockett v. Johnston*, 109 F.(2d) 445 (C. C. A. 9th 1940), *Seals v. Johnston*, 95 F.(2d) 501 (C. C. A. 9th 1938), *but cf. Lynch v. Johnston*, 160 F.(2d) 950 (C. C. A. 9th 1947), and Judge Denman, dissenting in *Thompson v. Johnston*, *supra*, note 107

¹⁵⁸ 28 U. S. C. A. 347, 348.